APPENDIX "A"

Contract Provisions

I. Excerpts from the Joint Area Cartage Agreement.

ARTICLE 8

Seniority

Buy-outs, Mergers and Consolidations Section 7. (a) Buy-outs:

(1) When operations of bought-out company are continued as a separate entity:
In the event an Employer buys out the business or operations of another Employer and operates it as a separate entity, then the seniority of the retained Employees shall continue as before.

(2) When operations of bought-out company are merged with operations of the buyer:
In the event an Employer buys out another Employer and merges the operations of the bought-out Employer into his own, those Employees of the bought-out Employer who are employed by the acquiring Employer will begin to accrue seniority with their new Employer at the beginning of such employment, and if two or more are employed on the same date their preference over each other shall be determined by their former seniority standing with the bought-out Employer. Employees in laid off status with recall rights shall be offered reemployment before Employees of the bought-out Employer are employed. A merger of Employers preceded or followed by the surviving corporation purchasing stock of the other Employer or exchanging its stock for that of the other Employer shall be treated as a buy-out by the surviving Employer for purposes of seniority.

(3) When Interstate Commerce Commission temporary authority is granted to control and merge:
Where an Employer only has temporary authority or approval to operate another company, then separate seniority lists shall continue in effect until final authority is granted and consummated. The company which is to survive will assume the obligations of both Collective Bargaining Agreements during the period of temporary authority or control.

(b) Merger with wholly-owned subsidiary:

Whenever an Employer organizes a wholly-owned subsidiary and later merges such subsidiary into itself as the survivor, then the seniority standing of the Employees of both companies shall be determined the same as in cases of consolidations after the operations of both companies are combined.

(c) Consolidations:

When the operations of two or more Employers are consolidated into a new business concern, the seniority standing of the Employees employed by the new business concern shall be determined by the names being sandwiched in, one-for-one, starting with the most senior Employee in each company.

ARTICLE 19

Grievance Procedure

Grievances Other Than Discipline or Discharge

Section 2. All differences relating to the interpretation or application of any provision of this Agreement, other than discharge or discipline of an Employee, shall be processed as follows:

(a) The Employer and the Union having jurisdiction over the Employee shall within five (5) working days

after notice of the grievance meet as a grievance committee and reach a settlement which shall be final and binding.

(b) If the parties fail to reach a settlement within the aforesaid time, then the matter shall be submitted to a permanent Joint Grievance Committee composed of six (6) Employer representatives designated by the following: Cartage Exchange of Chicago, Illinois Motor Truck Operators Association, Illinois Trucking Associations, Inc., Indiana Truckers Association (Calumet Chapter), Northern Illinois Truckers Association and Motor Carrier Labor Advisory Council, and six (6) Union representatives. The Joint Grievance Committee shall meet at a mutually convenient time and place on such regular or special basis as it shall determine, and shall render its decision or award within three (3) days after close of the hearing. If the Joint Grievance Committee resolves the dispute by a majority vote of those present and voting, then such decision shall be final and binding upon the Union, Employer, and Employee. If the Joint Grievance Committee is deadlocked on the disposition of the dispute then either party shall be entitled to all lawful economic recourse to support its position in the matter. The Joint Grievance Committee may adopt such rules of procedure as it determines necessary in its sole discretion, and shall have the power to require the production from the Employer of all books and records, including payroll and time sheets, necessary to a complete disposition of the dispute and to make a complete and final disposition of all matters before it including, but not limited to, a money award for violation of the wage, hour, overtime provisions or health and welfare or pension contributions, including costs and attorney's fees. Pending a disposition of the dispute by the Joint Grievance Committee, there shall be no strike or lock-out, except as hereinafter set forth, provided, however, 'that nothing herein shall authorize the Joint Grievance Committee to alter the terms and conditions of this Agreement or to make a new agreement.

II. Excerpts from the International Constitution of the International Brotherhood of Teamsters, etc.

Trials and Appeals of Local Unions, Other Subordinate Bodies and Elective International Union Officers

Section 3 (a). Whenever charges are preferred against a Local Union or against a Joint Council, or other subordinate body, such charges shall be filed in writing in duplicate with the Secretary of the trial body, and shall be served personally or by registered or certified mail on the Secretary-Treasurer of the Local Union or the Joint Council or other subordinate body so charged. If the charges are against the Local Union the trial shall be by the Executive Board of the Joint Council; provided that if a Local Union is not affiliated with a Joint Council due to the fact that no Joint Council exists with which such Local Union can affiliate, the trial shall be by the General Executive Board. If the charges are against a Joint Council or other subordinate body, the trial shall be before the General Executive Board. The provisions of this Section shall also be applicable when the Executive Board of the subordinate body is charged or is the charging party.

(b). A Local Union shall be accorded thirty (30) days time in which to appear for trial and submit its defense. In the case of a Joint Council or other subordinate body the time of trial shall be fixed by the General Executive Board.

(c). Appeals from decisions on charges against Local Unions or Local Union Executive Boards shall be taken to the General Executive Board and from it to the Convention. Appeals from decisions on charges against Joint Councils or other subordinate bodies shall be taken to the Convention by only the Joint Council or other subordinate body involved. In all other respects the procerure on appeals shall be the same as provided in Section 2.

(d). Trial of elective International Union officers shall be only before the General Executive Board at such time and place as fixed by the General Executive Board. The officer charged shall be found guilty only on a two-thirds (⅔) vote of the entire General Executive Board. Appeals by such general officers from decisions of the General Executive Board shall be to the Convention. Charges against elective officers of the International Union or any subordinate body shall be limited only to those activities or actions occurring during their current term of office, and only those activities and actions occurring prior to their current term which were not then known generally by the membership of the International Union or the subordinate body in the case of an officer of a subordinate body.

(e). Emergency powers provided for in Section 10 of this Article shall apply with the same force and effect to Local Union and Joint Councils and other subordinate bodies.

Decisions and Penalties

Section 9 (a). Decisions and penalties imposed upon individual members, officers, elected Business Agents, Local Unions, Joint Councils or other subordinate bodies found guilty of charges may consist of reprimands, fines, suspensions, expulsions, revocations, denial to hold any office permanently or for a fixed period or commands to do or perform, or refrain from doing or performing, specified acts. If the penalty is by way of fine, then the same must be paid pending an appeal, if one is taken, unless the General President upon request waives payment pending appeal. A Local Union ordered to reinstate a member or perform an act other than the payment of a fine must comply therewith as a condition precedent to taking an appeal unless the General President or the General Executive Board suspends such order pending the appeal. If the fine is against a member or officer of a Local Union, assessed by the Local Union, it shall be paid into the treasury of the Local Union. If a fine is

assessed against a Local Union by a Joint Council, the payment shall be to the treasury of the Joint Council.

(b). If the fine is assessed when the General Executive Board has assumed original jurisdiction, it shall be paid to the treasury of the International Union.

(c) When such penalty consists only of a fine and an appeal is taken, such fine shall be deposited as above provided; thereupon such member, elected Business Agent, officer, Local Union, Joint Council or other subordinate body shall be permitted to continue in the Local Union with full rights and privileges in accordance with the laws of the International Union. If on appeal the decision is reversed and the fine disallowed, then the same shall be returned to the party depositing the same. Whenever a decision is handed down by any trial or appellate body and an appeal is taken, such decision shall stand and remain in full force and effect until reversed by a higher body unless the General President upon request stays the effectiveness of the decision pending appeal.

(d) In the event of non-compliance with the decision handed down by a trial or appellate body, the member, elected Business Agent, officer, Local Union, Joint Council or other subordinate body shall stand suspended from all rights and privileges under this Constitution until the provisions of the decision have been complied with, unless the General President has waived payment of a fine or stayed the effectiveness of the decision pending appeal. If, however, the decision carries with it an order of expulsion, then such order of expulsion shall immediately take effect, unless the General President has stayed the effectiveness of the decision pending appeal.

(e) Any expelled member may be subsequently reinstated to membership in the Local Union front which expelled, or permitted membership in another Local Union, only by the action of the General Executive Board.

(f) Any member or Local Union that is tried by the General Executive Board cannot be tried for the same offense by a Local Union or Joint Council.

(g) The General Executive Board may send a case back to the Joint Council, the Local Union, or other hearing body or officer for further hearing, production of additional testimony, or for further consideration with or without such further hearing.

Exhaustion of Remedies

Section 12 (a) Every member, officer, elected Business Agent, Local Union, Joint Council or other subordinate body against whom charges have been preferred and disciplinary action taken as a result thereof, or against whom adverse rulings or decisions have been rendered or who claims to be aggrieved, shall be obliged to exhaust all remedies provided for in this Constitution and by the International Union before resorting to any court, tribunal or agency against the International Union, any subordinate body or any officer or employee thereof.

(b) Where a member, officer, elected Business Agent, Local Union, Joint Council or other subordinate body, before or following exhaustion of all remedies provided for within the International Union, resorts to a court of law and loses his or its cause therein, all costs and expenses incurred by the International Union may be assessed against such individual, Local Union, Joint Council or other subordinate body, in the nature of a fine, subject to all penalties applicable where fines remain unpaid.

Where such court action is by an individual or by a Local Union, Joint Council or other subordinate body against a Local Union, Joint Council or other subordinate body, the foregoing provision in respect to the payment of costs and expenses shall be applicable in favor of the Local Union, Joint Council or other subordinate body proceeded against in court.

(c) The appeals procedure provided herein is also available to and must be followed by any member who is aggrieved by any decision, ruling, opinion or action of the Local Union, membership, officers or Executive Board, excluding collective bargaining matters.

Section 13. All decisions following trials or hearings should be made and rendered within sixty (60) days of the date the hearing or trial commenced, unless otherwise ordered by the General Executive Board. This time requirement shall not be mandatory but is only directory.

APPENDIX "B"

Rulings of the District Court

I. Summary Judgment in favor of the Union.

UNITED STATES DISTRICT COURT,
Northern District of Illinois
Eastern Division

Name of Presiding Judge, Honorable Frank J. McGarr
Cause No. 77 C 3859
Date 1/9/81

JOSEPH PANTOJA, et al.,

vs.

ALL-AMERICAN TRANSPORT, INC., et al.,

Pursuant to memorandum opinion and order entered this day, the motion of the International Brotherhood of Teamsters, etc., Local 705, for reconsideration of this court's earlier denial of summary judgment, and for summary judgment, is granted.—DRAFT

II. Findings of Fact and Conclusions of Law given orally after trial.

The Court: Gentlemen, I think the circumstances justify my delivering findings of facts and conclusions of law from the bench. I have hastily scribbled notes, as you gentlemen argued and during the trial; I hope to utilize them.

I apologize, in advance, for the fact that this will not be the polished literary masterpiece that I might have produced, had I a week to work on it; but I think you

are entitled to a decision, and an early decision. I feel prepared to give it and, therefore, I intend these comments to be the findings of fact and conclusions of law, which the rules require of me in a non-jury case.

It is obvious that, in terms of the conclusions of law, that I do have jurisdiction of the matter; that I have heard adequate evidence concerning the issues in the case; and that I am in an adequate position to decide it; and that the factual determinations, I am about to comment on, are the findings that I need give you.

By way of preliminary comment, corporate mergers, buy-outs, business failures, retrenchments, the various business adjustments—either to the dictates of the economy or their own plans for progression of the maximization of profits—produce layoffs and demotions. This hardship—this type of hardship—and it is, obviously, a hardship for those persons affected—is frequent on the corporate scene. And it is the understandable progenitor of emotional reactions, resentments and anger. And an individual who, after some long and devoted service to a corporation, finds that his employer has been sold to somebody else, and he is at the bottom of a seniority list and no longer recognized as a long and faithful employee, that individual has an understandable emotional and angry reaction. And, in a sense, that individual is a victim of the soulless corporate system; which is exactly what it is, since corporations have no souls, and operating within the law, they are entitled to operate, if they remain within the law, motivated solely by the maximizations of their profit.

At the outset, it occurred to me that this case seemed to present a simple legal issue—one almost ripe for summary judgment—the simple issue of whether the original transaction, whereby All-American bought Mid-Continent, was a buy-out and, if so, what were the contractual consequences of that.

The defense, however, had a—for want of a better word, I might call a conspiracy theory; a conspiracy to the effect that what seemed plain and apparent, in terms of buy-out, in the application of the contract, was really, as Mr. Intini argued, a substitution of form for substance and a part of a plot, in effect—using that in its least perjorative sense—to achieve a result as part of a total long-term corporate maneuver or series of maneuvers, which interfered with the rights of the plaintiffs.

Indulging that theory—or the possibility that that theory might be demonstrated, I gave the plaintiff's a great deal of latitude in presenting their case and developing any aspect of that theory that they thought was appropriate.

The plaintiffs, of course, have demonstrated a steady erosion of their position, their employee status, through a corporate buy-out and, subsequently, a corporate merger which, at the end, found them having dropped from the top of the seniority list of a small company to the lowest ten percent of the seniority list of a much larger company after one buy-out and one consolidation or one merger.

Whatever the dispute they had with the union, the plaintiffs' rights, obviously, flow from the contract which binds the employer here and which creates such rights as the plaintiffs have in the interpretation of that contract and the contract agreement with Local 705, operative in this geographic area. And I emphasize that to indicate that nothing that happened in Milwaukee, or anywhere else, has any bearing on this case. We are concerned with companies here, employees here and the contract here.

It is my conclusion, from the evidence, that when All-American Transport acquired Mid-Continent it was an independent, unique corporate transaction, which constituted a buy-out; and that, under the terms of the

contract, under which the plaintiffs here worked, the consequence of that buy-out was that the Mid-Continent employees—the eleven of them—found themselves at the bottom of the seniority list of All-American Transport drivers.

There has been much evidence concerning later All-American and Terminal Transport consolidation, because the drivers are, understandably, concerned by and angered by the fact that in that transaction that instead of the lists being assembled—the seniority lists being assembled with one group of employees on top and one group on the bottom, they were "sandwiched"—to use the word that has come about here. If, of course, in the original transaction, the Mid-Continent drivers had been sandwiched, the eleven would have found themselves in a much more desirable seniority position. And it is their contention and their argument that the second transaction shows the way for the first transaction and that it should have been handled in the same way.

That argument falls in face of the fact, however, that the second transaction—the All-American-Terminal Transport transaction—was not a buy-out, but a consolidation or merger; and that, in accordance with the provisions of the contract with Local 705, the consequences were different; and the sandwiching was the consequence there. The dropping to the bottom of the list was the appropriate consequence in the first transaction.

In fact, the second transaction—and in order to make clear what I am talking about, I am referring, of course, to the All-American-Terminal Transport consolidation—is really not germane to this case, because, having heard the evidence and having concluded that this was a consolidation and having concluded that the seniority lists were rightly sandwiched, we are entitled to set it aside as a situation with a different consequence, because of the different facts and different applications of different sections of the contract. And the end result of

hearing all the evidence on that is the inevitible conclusion that it does not help us in deciding the case before the .....

Union people testified—called by the plaintiff—the union took the position I have described; that is, that the first transaction was a buy-out, that the seniority lists were properly handled, when the Mid-Continent drivers went to the bottom of the list, and that the second transaction was a consolidation and that the seniority lists were properly merged in this case.

Actually the union has been dismissed from this case, but it have have well remained in this case, because I heard all the evidence that the union would have produced, I assume, in the person of Mr. Carmel, the union counsel and the business agent who just testified.

The union's position was right. The union conducted itself, in the circumstances, correctly and appropriately applied the contract and made the correct decisions and gave the employees—the plaintiffs here—the members—the plaintiff employees—all the representation they were entitled to, both in terms of its conclusions as to their rights and in the handling of their grievances.

So, as I said, the fact that the union was dismissed from the case becomes a somewhat unusual circumstance, because I have heard enough evidence that if the union were in the case, I would have ruled for them.

The plaintiff has a theory that the All-American buy-out of Mid-Continent was not a simple, discreet, unique transaction, but rather the first step in a complex series of corporate maneuvers, orchestrated by Texas Gas, and that part of the scheme was to get Mid-Continent routes and effectuate savings by eliminating Mid-Continent drivers.

So, the plaintiff argue that what actually happened to the drivers was not the inevitible result or what happened to the plaintiffs was the result of a pre-planned

conspiracy to eliminate them by creating forms of transactions which concealed the true substance of the transactions.

Of course, the other side of that argument is that what actually happened to the plaintiffs was the inevitible fall-out of this series of corporate maneuvers and, if the maneuvers were legal and appropriate in the first place, the fact that they were pre-planned is inconsequential.

Defendants' Exhibit 5—the September 8th memo of closing—reveals the complex corporate maneuvers and the role of Texas Gas in, if not orchestrating these maneuvers, at least approving all of them. Part of the complicated closing, revealed in that memorandum, is in response to the intricate Interstate Commerce Commission regulatory system; part of it reflects a furtherance of long-range corporate plans, no doubt influenced by Texas Gas. But the plaintiffs' contention that this reveals that, at the time of the original All-American buy-out of Mid-Continent, we were really kicking off a long-range conspiracy to deprive the plaintiffs of their rights is not supported by that document, or by any other evidence in the case.

Whether or not this was a long-range play may or may not be true; but it isn't relevant. Whatever the subsequent steps were, the first step was a separate, unique, discreet transaction—the buy-out of Mid-Continent by All-America.

The fact that a resulting corporation, one year later—the resulting corporation, one year later merged, whether pre-planned or not, doesn't claim the character of the original All-American buy-out of Mid-Continent and, at the time of that guy-out, the rights of the plaintiffs arose under the 705 contract. 705 properly interpreted the contract, the employer properly interpreted the contract, and the decision that took the Mid-Continent drivers to the bottom of the new All-American list was a decision in accordance with the contract.

I don't have to decide, fortunately, whether this is fair. This is an agreement the plaintiffs drove under and worked under; and it is the agreement that establishes the rights and binds them.

When the plaintiffs filed this lawsuit and when they filed their grievances, they argued that they were retaliated against by their employers. This issue is not really squarely before me, because I am being asked to determine what rights they had under the contract at 705; and I have determined that. But, because I admitted evidence concerning this claimed retaliation, I feel that I should comment on it.

I have no doubt that, in the realm of human affairs, there is some resentment against—by an employer against an employee who is filing grievances and lawsuits, especially if the employer feels that he is justified and that the employee is wrong. But what was really happening to the plaintiffs in this case is that they were being treated as "ten-percenters"—and the sad fact is that that is exactly what they were—and what was happening to them was that their former seniority was, unfortunately, gone and they were not enjoying the benefit of that seniority and, thus, felt that they were being discriminated against and the subject of unfair treatment. And, while that felling is understandable, it has no legal consequences in this decision.

Therefore, my conclusion is that the plaintiffs have not proved their case. I deny the plaintiffs' prayer for the relief sought in the complaint and find for the defendants. And that will be the judgment of the Court.

I guess that concludes it.

We will recess at this time.

(Which were all the proceedings had in the foregoing cause this day and date.)

III. Judgment in favor of the Employers after trial.

UNITED STATES DISTRICT COURT

For The

Northern District Of Illinois, Eastern Division

JOSEPH PANTOJA, et al.

vs.

ALL-AMERICAN TRANSPORT, INC., et al.

Civil Action File No. 77 C 3859

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable Frank J. McGarr, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiffs take nothing and that the action be dismissed on the merits.

Dated at Chicago, Illinois, this 14th day January, 1981.

/s/ Stuart Cunningham

APPENDIX "C"

Order of the Court of Appeals.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Argued: June 1, 1982

September 1, 1982

Before

Hon. Richard D. Cudahy, Circuit Judge
Hon. John L. Coffey, Circuit Judge
Hon. Robert A. Grant, Senior District Judge*

Nos. 81-1206
81-1238

JOSEPH PANTOJA, et al.,

Plaintiffs-Appellants,

vs.

ALL-AMERICAN TRANSPORT, INC., et al.,

Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 77-C-3859

FRANK J. MCGARR, *Judge.*

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* The Honorable Robert A. Grant, Senior District of the Northern District of Indiana, is sitting by designation.

ORDER

Plaintiffs, all members of Teamsters Union, Local 705 (the "Union"), filed this suit under section 301(a) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a) (1976), alleging that their employers (various trucking companies) breached their collective bargaining agreement by denying them contractual seniority rights. Plaintiffs also allege that the Union breached its duty of fair representation in failing to process a grievance on the seniority issue. The district court granted the Union summary judgment on the ground that plaintiffs failed to exhaust internal union remedies before instituting suit against the union. After a bench trial, the district court concluded that the employers did not breach the collective bargaining agreement when plaintiffs were placed at the bottom of a seniority list after their former employer was purchased by another firm. We affirm the judgments in favor of the Union and the employers.

The breach of contract alleged by plaintiffs arose from a series of transactions in which their former employer, Mid-Continent Freight Lines, Inc. ("Mid-Continent") was purchased by All-American, Inc. ("All-American"). In September, 1976, All-American submitted an application to the Interstate Commerce Commission ("ICC") to acquire Mid-Continent. Although the application was initially denied, the ICC granted All-American's temporary control application in November, 1976, and All-American subsequently assumed control of Mid-Continent's operations. Pursuant to article 8, section 7(a)(3) of the Joint Area Cartage Agreement (the "JACA") between the Union and both All-American and Mid-Continent, All-American retained separate seniority lists for the employee of each company during the period All-American exercised temporary control over Mid-Continent under the ICC order. In June, 1977, the ICC approved the purchase of Mid-Continent by All-American and granted All-American's permanent control application. All-American then completed its purchase of Mid-Continent, and Mid-Con-

tinent's operations were fully integrated into All-American. It is undisputed that Mid-Continent, as an entity, did not survive this transaction.

Shortly after the ICC approved All-American's purchase of Mid-Continent, the Union requested from its counsel an opinion on the seniority rights of the former Mid-Continent employees now employed by All-American. Counsel informed the Union that, under section 7(a)(2) of the JACA, the acquisition of Mid-Continent constitued a "buy-out" in which the operations of the purchased company were merged into those of the purchasing company. In such circumstances, section 7(a)(2) of the JACA dictates that the former employees of Mid-Continent who continue employment with the new employer, All-American, must be placed at the botton of All-American's seniority list.[1]

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[1] Article 8, section 7 of the JACA sets out in detail the seniority consequences of various corporate transaction as follows:

Buy-outs, Mergers and Consolidations

Section 7. (a) Buy-outs:

(1) When operations of bought-out company are continued as a separate entity:
In the event an Employer buys out the business or operations of another Employer and operates it as a separate entity, then the seniority of the retained Employees shall continue as before.

(2) When operations of bought-out company are merged with operations of the buyer:
In the event an Employer buys out another Employer and merges the operations of the bought-out Employer into his own, those Employees of the bought-out Employer who are employed by the acquiring Employer will begin to accrue seniority with their new Employer at the beginning of such employment, and if two or more are employed on the same date their preference over each other shall be determined by their former seniority standing with the bought-out seniority Employer. Employees in laid-off status with recall rights shall

The Union forwarded this opinion to All-American, and All-American followed this interpretation of the collective bargaining agreement. Plaintiffs in this action, as former Mid-Continent employees, then filed a grievance petition with the Union. The Union did not process the grievance but rather informed plaintiffs at a meeting with All-American and former Mid-Continent drivers that in view of the opinion of its counsel and the provisions of the collective bargaining agreement, the grievance was without merit.

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[1] (Continued)

be offered re-employment before Employees of the bought-out Employer are employed. A merger of Employers preceded or followed by the surviving corporation purchasing stock of the other Employer or exchanging its stock for that of the other Employer shall be treated as a buy-out by the surviving Employer for the purposes of seniority.

(3) When Interstate Commerce Commission temporary authority is granted to control the merger:
Where an Employer only has temporary authority or approval to operate another company, then separate seniority lists shall continue in effect until final authority is granted and consummated. The company which is to survive will assume the obligations of both Collective Bargaining Agreements during the period of temporary authority or control.

(b) Merger with wholly-owned subsidiary:
Whenever an Employer organizes a wholly-owned subsidiary and later merges such subsidiary into itself as the survivor, then the seniority standing of the Employees of both companies shall be determined the same as in cases of consolidations after the operations of both companies are combined.

(c) Consolidations:
When the operations of two or more Employers are consolidated into a new business concern, the seniority standing of the Employees employed by the new business concern shall be determined by the names being sandwiched in, one-for-one, starting with the most senior Employee in each company.

During the period All-American operated Mid-Continent under the ICC-approved temporary application, ownership of All-American also changed hands. All-American was a subsidiary of a holding company known as All-American Transport, Inc., ("Transport"). At about the same time All-American filed its application with the ICC to acquire Mid-Continent, Texas Gas Transmission Corp. ("Texas Gas"), through its subsidiary American Commercial Lines ("Commercial"), filed an application with the ICC to acquire Transport. Texas Gas, which already owned another trucking firm, Terminal Transport, Inc., ("Terminal Transport") sought to acquire Transport as part of its plan to diversify in the field of interstate motor carriers. The ICC approved Texas Gas' acquisition of Transport before the ICC granted final approval to All-American to acquire Mid-Continent. Because of the confusing similarity between the names Terminal Transport and All-American Transport, Texas Gas renamed its new acquisition American Freight System, Inc. ("AFS"). Thus, when the acquisition of Mid-Continent by All-American was approved by the ICC, the parent company of All-American had been purchased and renamed AFS by Texas Gas.

Shortly *after* the ICC approved All-American's acquisition of Mid-Continent in June, 1977, Texas Gas placed both of its motor carriers—All-American and Terminal Transport—under the new AFS holding company, continuing, however, to maintain the separate identities and operations of each carrier. In September, 1977, Texas Gas determined, for various financial and personnel reasons, that it would consolidate the motor carrier operations of All-American and Terminal Transport into a *new* entity. This new entity was also called American Freight System, Inc., *but this name was subsequently changed to ACT* Companies, Inc. The ICC approved the consolidation of All-American and Terminal Transport into ACT Companies, Inc.

For purposes of seniority, the seniority lists of All-American and Terminal Transport were "dove-tailed" or "sandwiched" as provided in section 7(c) of the JACA upon the consolidation of these two subsidiaries into the new company, ACT Companies. Section 7(c) provides that "[w]hen the operations of two or more Employers are consolidated into a new business concern," a new seniority roster is devised by "sandwich[ing] in, one-for-one, starting with the most senior Employee in each company." *See, infra,* note 1. No employees, including plaintiffs, filed a grievance over this interpretation of the collective bargaining agreement, and the Union apparently also approved this interpretation. Plaintiffs' claim, however, that because of their placement at the bottom of All-American's seniority roster when All-American bought Mid-Continent, they were necessarily dovetailed into the seniority roster of the *new ACT Companies, Inc.,* at or near the bottom, thereby further perpetuating the previous error with respect to All-American's list. Moreover, plaintiffs assert that the complicated corporate transactions which resulted in the "buy-out" of Mid-Continent and the "consolidation" between All-American and Terminal Transport are merely subterfuges to cover up the real motive of the employers and Union—to deny these plaintiffs their rightful seniority.

II.

The district court granted the Union summary judgment on January 9, 1981. The court's decision was based on our then recent opinion in *Tinsley* v. *United Parcel Service, Inc.,* 635 F.2d 1288 (7th Cir. 1980) (*Tinsley I*), which held that the failure to exhaust mandatory internal union remedies would bar a suit by an employee against his union for breach of the duty of fair representation, provided that exhaustion of those remedies was not futile. The Supreme Court subsequently vacated out decision in *Tinsley I,* 452 U.S. 934 (1981), in light of the Court's recent decision in *Clayton* v. *UAW,* 451 U.S. 679 (1981). Plaintiffs argue on appeal that *Clayton* mandates that we

reverse the grant of summary judgment below. We disagree.

In *Clayton*, the Supreme Court reaffirmed the principles we recognized in *Tinsley I* that exhaustion of mandatory internal union appeal procedures is consistent with the national labor policy, which favors nonjudicial resolution of employment contract disputes. *See Tinsley* v. *United Parcel Service, Inc.*, 665 F.2d 778, 789 (7th Cir. 1981) (*Tinsley, II*). Exhaustion of remedies is not, however, required in every case since the "courts have discretion to decide whether to require exhaustion." *Clayton*, 451 U.S. at 689. To guide this exercise of discretion, the *Clayton* Court noted that if "the internal union appeals procedures would be inadequate either to reactivate the employee's grievance or to award him the full relief he seeks," then a court could "properly excuse the employee's failure to exhaust." 451 U.S. at 689.[2]

We do not believe that we should exercise our discretion here to excuse plaintiffs' failure to exhaust their internal union remedies. These procedures are mandatory for every Union decision,[3] and this court has previously

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[2] The Court also mentioned two other factors that might excuse a failure to exhaust: inability to obtain a fair hearing because of the hostility of union officials, and unreasonable delay of a judicial hearing if exhaustion is required. *Clayton*, 451 U.S. at 689. Plaintiffs in the instant case have neither asserted that their failure to exhaust is excused by either of these two factors nor cited to us any evidence to indicate that a requirement of exhaustion here would be futile or unfair.

[3] We agree with the district court that Article XIX, § 12(a) of the Teamsters' International Union Constitution, which provides, *inter alia*, that "[e]very member . . . who claims to be aggrieved" by a union decision must exhaust all internal remedies, mandates exhaustion by plaintiffs in this case. *See* Order of Jan. 9, 1981, at 2-4. Although section 12(a) may seem more clearly applicable to instances in which a member challenges union

recognized the general adequacy of these same remedies. *See Tinsley I*, 635 F.2d at 1290. Moreover, although the Union may not be able to award plaintiffs the relief they seek (*i.e.*, credit with All-American for the seniority they earned as employees of Mid-Continent), it is undisputed here that the union internal appeals procedure could reactivate the grievance since the collective *bargaining agreement contains no time limit within* which this grievance must be presented to the employer.[4] Thus, by fol-

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[3] (Continued)

discipline imposed upon him, the broad language of this provision makes it applicable to any grievance arising from a union decision which affects a member. Our conclusion in this respect is not altered by section 12(c), *which exempts "collective bargaining" matters from the* exhaustion of appeal procedures under section 12(a). Even if the present controversy between plaintiffs and the Union falls within the cryptic and ill-defined category of "collective bargaining," the exemption provision would exempt planitiffs from utilizing the *appeals* procedure but not from *initially* filing a complaint with the union before instituting the lawsuit.

[4] This factor distinguishes the instant case from *Clayton*. In *Clayton*, the Court held that exhaustion could not be required as a prerequisite to suit there because the internal union remedies could *neither* grant plaintiff the relief he sought *nor* reactivate the grievance since a request for arbitration was time-barred under the contract. 451 U.S. at 691. The *Clayton* Court did not require that *both* of these possible outcomes be achievable as prerequisites to exhaustion, since *each* is designed to provide plaintiffs potentially with the relief they seek from their employer. The internal union remedies are entirely adequate where, as here, the reactivation of the grievance with the employer could result from the invocation of these remedies. *See Miller* v. *General Motors Corp.*, ... F.2d ..... (No. 81-1812 7th Cir. Apr. 9, 1982); *cf. Tinsley II*, 665 F.2d at 780 (union remedies could provide *plaintiff directly with relief sought; hence,* exhaustion of internal union remedies required).

lowing the internal union appeals procedure, plaintiffs could potentially, without the need for court intervention, obtain a reversal of the Union's decision not to process a grievance. This is precisely the purpose of requiring exhaustion as recognizing by the *Clayton* Court. *See Miller* v. *General Motors Corp.*, ... F.2d ..... (No. 81-1821 7th Cir. Apr. 9, 1982).

Plaintiffs' ostensibly most persuasive argument against applying the exhaustion principles of *Clayton* is that *Clayton* mandates exhaustion of internal union remedies only for "*internal* Union matters such as those involving the interpretation and application of a union constitution." 451 U.S. at 688 (emphasis in original). But this argument seems to be premised upon plaintiffs' quoting of the above statement out of its context. Justice Brennan, writing for the majority in *Clayton*, did not intend to limit the exhaustion principles he recognized only to cases involving internal union matters. Rather, he made the above quoted statement in the context of discussing the appropriate *rationale* for requiring employees to exhaust, intra-union remedies. In this regard, Justice Brennan concluded that the "policy of forestalling judicial interference with internal union affairs," rooted in section 101(a)(4) of the Landrum-Griffin Act, 29 U.S.C. § 411(a)(4) (1976), was not a rationale) applicable to the case before him because this policy was applied only in cases involving internal union disputes, and the case before him (like the case before us) did not *concern internal union matters*. 451 U.S. at 688-89 & n.13.[5]

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[5] Section 101(a)(4) of the Landrum-Griffin Act prohibits unions from limiting the right of union members to institute court suits, with the exception that before the member may sue the union or an officer of the union, the member must exhaust internal union hearing procedures. This provision is set out in what is commonly referred to as the labor union member's "bill of rights," and the courts have limited the exhaustion requirement imposed by Section 101(a)(4) to such internal union matters as are affected by the bill of rights. *See NLRB* v. *Marine Workers*, 391 U.S. 418 (1968).

The appropriate rationale to justify exhaustion, according to Justice Brennan, was "that aspect of national labor policy that encourages private rather than judicial resolution of disputes arising over collective-bargaining agreements." 451 U.S. at 689; *see Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965). And in applying this rationale, Justice Brennan concluded that the Court could not impose a mandatory, universal exhaustion requirement but rather, as we note here, judicial discretion must govern the application of the requirement for exhaustion of intra-union remedies. We therefore reject plaintiffs' reading of *Clayton*, which would limit the exhaustion requirement to grievances involving internal union affairs, as contrary to the Supreme Court's clear intention to further a discretionary application of the exhaustion principle. Therefore, the order of the district court granting the Union summary judgment for plaintiff's failure to exhaust intra-union remedies is affirmed.[6]

III.

At the close of a three-day bench trial, the district court ruled that plaintiffs had not proven their case against the various employers who are defendants in this action. The court concluded that All-American's acqui-

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[6] Because summray judgment is proper on this ground, we need not address plaintiffs' claims that there are issues of fact concerning the Union's alleged breach of the duty of fair representation. Plaintiffs apparently argue that we ought still to address those grounds because the district court considered the union's breach of the duty of fair representation on the merits when ruling from the bench after a trial on the question of the alleged breach of contract by the employers. To the extent the district court considered the merits of the breach of fair representation question, these were, as will be explained in section III, *infra*, germane only to the employer's liability under section 301(a) of the LMRA and had no effect on the grant of summary judgment in favor of the union for failure to exhaust internal union remedies.

sition of Mid-Continent was an independent transaction constituting a "buy-out" with merger of the operations of the bought-out company, which, under the JACA, permitted All-American to place plaintiffs at the bottom of its seniority list. Tr. at 377. The subsequent integration of *All-American and Terminal Transport into the new entity, ACT* Companies was, according to the district court, a consolidation" or merger," which required the "sandwiching" of both companies' seniority lists under the JACA. Tr. at 378. Thus, the court concluded that the employers did not breach provisions of the collective bargaining agreement pertaining to seniority rights. Moreover, the court also concluded that the union "correctly and appropriately applied the contract . . . and gave the employees . . . all the representation they were entitled to . . . ." Tr. at 379.

It is now axiomatic that when the collective bargaining agreement vests in the union exclusive authority to process grievances, employees cannot sue employers under section 301(a) of the LMRA for an alleged breach of the agreement unless they first establish that their union breached its duty of fair representation in pursuing the grievance. *Vaca* v. *Sipes,* 386 U.S. 171, 185-86 (1967). The union breaches its duty of fair representation when its "conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca,* 386 U.S. at 190; *accord Hoffman* v. *Lonza,* 658 F.2d 519, 524 (7th Cir. 1981) (Cudahy J., concurring). Thus, if the employer asserts as a defense in a section 301(a) action the employee's failure *to exhaust all stages of a* grievance procedure established in a collective bargaining agreement, a reviewing court must first decide whether the union breached its duty of fair representation before determining if the employer violated the contract.

In the instant case, it is evident, because the Union initially decided not to process plaintiffs' claim as a grievance, that the plaintiffs did not exhaust the grievance procedure *set out in the JACA*. It is unclear, how-

ever, whether the defendants here are *relying* on this failure to exhaust contract grievance procedures as a defense in this action. If these employers *are* relying on such a failure we would be required to determine in the first instance whether the Union breached its duty of fair representation in refusing to process plaintiffs' grievance. Although defendants do not address the question in their appellate brief, the court below was apparently aware of an exhaustion defense since it discussed in its ruling from the bench the question whether the Union's conduct in these matters amounted to a breach of the duty of fair representation. Moreover, the plaintiffs' allegations of a conspiracy between the Union and the employers is generally consistent with a claim that the Union's refusal to process a grievance constitued a breach of the fair representation duty. *See, e.g., NLRB* v. *David Buttrick Co.*, 361 F.2d 300 (1st Cir. 1966); *Kirkland* v. *Arkansas-Best Freight System, Inc.*, 475 F. Supp. 180 (E.D. Ark. 1978), *aff'd in part, rev'd in part on other grounds*, 629 F.2d 538 (8th Cir. 1980), *cert. denied*, 450 U.S. 980 (1981). Hence, we will consider as a threshhold question whether the Union breached its duty of fair representation when it refused to process the plaintiffs' grievance, but we will also examine whether the district court correctly concluded, as an independent matter, that the employers did not violate plaintiffs' seniority rights under the JACA.

We have no difficulty in agreeing with the district court that the Union provided these plaintiffs with fair representation. This is not a case where the union has failed to investigate the grievance of decided not to pursue the grievance for an arbitrary reason. Rather, the Union requested its counsel to review the sale of Mid-Continent to All-American, and the Union then abided by the opinion of its counsel that All-American had "bought-out" Mid-Continent within the meaning of section 7(a)(1) of the JACA. The impact of this opinion was, as the district court recognized, unfavorable to these plaintiffs since

they lost seniority previously earned with Mid-Continent. But an unfavorable union decision, taken in good faith and without arbitrariness, is not enough to breach the duty of fair representation. *Cf. Kesinger* v. *Universal Airlines, Inc.*, 474 F.2d 1127 (6th Cir. 1973) (mere fact that one group of employees was worse off than another group after seniority lists were integrated does not show breach of fair representation absent bad faith on part of union). Moreover, plaintiffs did not persuade the district court, nor have they persuaded us, that the Union's interpretation of the contract was inconsistent with past practice or impermissibly tainted by animosity between Union leaders and these plaintiffs. *See Rupe* v. *Spector Freight Systems, Inc.*, ... F.2d ..... (Nos. 81-1490 & 81-1590 7th Cir. May 28, 1982). In sum, we cannot find that the Union's handling of plaintiffs' grievance breached the duty of fair representation.

The district court also determined, on the merits of the question, that the defendants did not breach the collective bargaining contract. Again we agree with the court's determination. As a preliminary matter, the district court found that the transaction in which All-American acquired Mid-Continent was distinct from the later corporate transaction in which Texas, having acquired All-American, eventually consolidated All-American and Terminal Transport. The court thus rejected plaintiffs' claim that these various corporate transactions were part of a scheme designed to interfere with the plaintiffs' seniority rights. We do not find that the district court's factual determinations with respect to this matter are clearly erroneous.

With the elimination of their unsupported conspiracy claims, plaintiffs can produce little to challenge the employers' application of the contract. All-American's acquisition of Mid-Continent was clearly a "buy-out" with merger of the operations of the bought-out company, as contemplated under section 7(a)(2) of the JACA. It is undisputed that all of Mid-Continent's assets were trans-

ferred to All-American, that Mid-Continent's trucking operations were fully integrated into All-American's operations and that Mid-Continent did not survive the sale as a corporate entity. We believe that this transaction could not have been anything but a "buy-out" as that term is commonly used. Moreover, the subsequent transaction orchestrated by Texas Gas, combining All-American and Terminal Transport under the control of a third corporation was not a buy-out but was rather a "consolidation." Two previously *separate corporate entities,* which operated independently but which were owned by the same corporation, were consolidated into a new corporation, AFS (*later* renamed ACT Companies, Inc.), so that the operations of the subsidiaries were fully integrated under the ownership and control of the pre-existing parent corporation. This transaction is quite different from All-American's purchase of Mid-Continent in that both corporations, All-American and Terminal Transport, were in the first instance subsidiaries of the *same* corporation and they were integrated into a *new* corporation; in the Mid-Continent/All-American transaction, on the other hand, both corporations were owned by different parent corporations, and no new corporate entity was created but rather one company (All-American) was the sole survivor of the transaction. Thus, the employers properly applied section 7(c) of the JACA to the All-American/Terminal Transport transaction by sandwiching or dovetailing the seniority lists of All-American and Terminal Transport.

IV.

The grant of summary judgment in favor of the Union is affirmed. The order dismissing on the merits the plaintiffs' action against the employer defendants is affirmed.

AFFIRMED.